IN THE HIGH COURT OF DELHI AT NEW DELHI

**Crl.M.C. No.2343/2005**

# Smt.Pratima Sharma ... Petitioner
! through: Mr.Yogesh Kapoor, Adv.

VERSUS

$ M/s.Cartel Finance & Investments Pvt. Ltd. & Anr. ... Respondents
^ through: Mr.Jitender Sarin, Adv. for respondent No.1.

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% **D**ATE OF DECISION: 24-10-2007

**CORAM:**
* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Petitioner has been summoned to face trial for an

offence under Section 138 of the Negotiable Instruments Act 1881 read with Section 141 thereof.

2. It is not in dispute that the petitioner and Ramesh Bareja are the only 2 partners of the firm M/s.Forgewell Engineering Corporation. It is also not in dispute that the petitioner is not shown as a sleeping partner of the firm as per the partnership deed.

3. It is also not in dispute that the cheques forming subject matter of the complaints were issued from the account of the firm M/s.Forgewell Engineering Corporation. It is also not in dispute that the cheques were not honoured by the banker on whom the cheques were drawn.

4. In the complaints filed, the partnership firm has been impleaded as accused No.1. Ramesh Bareja has been impleaded as accused No.2. Pratima Sharma i.e. the petitioner has been impleaded as accused No.3.

5. Material averments in the complaint which need to be noted are in para 4 of the complaints. Save and except the cheque numbers, date of cheque and the amount, all averments in para 4 of both the complaints are identical. I note the averments in para 4 only in one complaint. It reads as under:-

> "4. That the accused failed to make the

> timely re-payments and consequently a huge outstanding, including interest, accrued in their account. After a lot of persuasions and repeated follow-ups the accused issued a cheque No.819645 dated 15.7.2002 drawn on Punjab & Sind Bank, Janpath, New Delhi for a sum of Rs.1,00,000/- towards part discharge of the aforesaid liability. The cheque was signed by the accused No.2 Ramesh Bareja as partner of accused No.1 M/s. Forgewell Engineering Corporation. The accused Nos.2 and 3 are/were the partners of accused No.1 and are/were looking after the day-to-day affairs of accused No.1 during the relevant period. Both accused No.2 and 3 are/were in-charge o and responsible for the conduct of the business of accused No.1 and are thus jointly and severally liable for the acts."

6. It is urged by learned counsel for the petitioner that actionable averments in the complaint ought to have been that the petitioner was responsible for the affairs of the partnership firm with particulars as to how she was responsible for the affairs thereof. It is urged that in the absence of particulars of how the petitioner is responsible for the business of the partnership firm, there are no actionable averments in the complaint and hence learned Metropolitan Magistrate could not have taken cognizance of the complaint much less summon the petitioner.

7. A perusal of para 4 of the complaint shows that the complainant has averred that accused No.2 i.e. Ramesh Bareja as partner of accused No.1 i.e the partnership firm had signed the cheques. Thereafter it has been averred that apart from Ramesh Bareja, even petitioner was a partner of accused No.1 and that

both were looking after day-to-day affairs of the partnership firm during the relevant period. There are further averments that both partners were in-charge of and responsible for the conduct of business of the accused No.1.

8. Learned counsel for the petitioner cites (2004) 7 SCC 15 *Monaben Katenbhai Shah and Anr. vs. State of Gujarat & Ors.* to urge that a similarly worded complaint was held to be lacking in material particular and hence summoning order against a partner was quashed by the Supreme Court.

9. Averments in the complaint which were considered by the Supreme Court in *Monaben's* case (supra) were as under:-

> "(1) The accused in this matter, for the development of their business had taken amount of Rs.60,000/- through agent on 8.1.1998 which was paid by us vide Cheque No.7432109 drawn on Canara Bank for Rs.60,000/- which is received by the accused, therefore, the receipt was also issued on 8.1.1998.
>
> (2) The said amount was for 2.5 months. Therefore, the accused had issued us a cheque No.3358762 dated 23.3.1998 drawn on State Bank of Saurashtra, Kalanala Branch, Bhavnagar for a sum of Rs.62,250/-. On presentation of the said cheque in our account the accused had stopped payment on the said cheque so it was returned. Canara Bank was given intimation in this regard by letter dated 17.9.1998, SBS Kalanala, Bhavnagar. And, therefore, on 19.9.1998 Canara Bank informed us, so the notice through advocate dated 28.9.1998 was issued to the accused. And although all of them are served but no amount is paid."

The material part of the title of the complaint reads thus:

"Karta of Himanshu Jayantilal,
HUF
Himanshu Jayantilal Thakkar ...Complainant

Versus

Partners of Sona Fibres

(1) Shah Madhumati Harshadraj
(2) Harshadrai vs. Shah (HUF)
(3) Monaben Ketanbhai Shah
(4) Sonaben R.Shah
(5) Rupaben Harshabhai Shah ...Accused"

10. A perusal of the averments which were noted by the Supreme Court in the complaint which was subject matter of consideration in *Monaben's* case (supra) revealed that the only averment against the appellants therein was that they were the partners of the partnership firm Sona Fibres. It was in relation to said averment that the Hon'ble Supreme Court observed as under in para 6 of the decision:-

> "6. From the above, it is evident that in the complaint there are no averments against the appellants except stating in the title that they are partners of the firm. Learned counsel for the respondent complainants contended that a copy of the partnership deed was also filed which would show that the appellants were active in the business. No such document was filed with the complaint or made part thereof. The filing of the partnership deed later is of no consequence for determining the point in issue. Section 141 does not make all partners liable for the offence. The

> criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint."

11. In para 7, Hon'ble Supreme Court while noting the decisions in *K.P.G. Nair vs. Jindal Menthol India Ltd.* (2001) 10 SCC 218 and *Katta Sujatha vs. Fertilizers & Chemicals Travancore Ltd.* (2002) 7 SCC 655 observed as under:-

> "7. In *K.P.G. Nair vs. Jindal Menthol India Ltd.* (2001) 10 SCC 218 this Court held that the substance of allegations read as a whole should answer and fulfill the requirements of the ingredients of Section 141. The criminal complaint was quashed in *Katta Sujatha vs. Fertilizers & Chemicals Travancore Ltd.* (2002) 7 SCC 655 since in the complaint it was not stated that the accused was in charge of the business and was responsible for the conduct of the business of the firm nor was there any other allegation that she had connived with any other partner in the matter of issue of cheque."

12. It is thus apparent that the sole averment that a

particular person was a partner of a firm was held to be an insufficient averment to attract liability under Section 138 read with Section 141 of the Negotiable Instruments Act 1881 against the partner of a firm.

13. In the instant case, there are specific averments that apart from Ramesh Bareja, even petitioner, as partner of the firm was looking after the day-to-day affairs of the partnership firm and was along with Ramesh Bareja was in-charge and responsbile for the conduct of the business of the partnership firm.

14. I may like to point out that vis-a-vis directors of a company and partners of a partnership firm, position of law needs a little clarification.

15. In law, unless otherwise made liable for the conduct or action of somebody else, no person would be liable for an offence committed by somebody else. For example, under the Indian Penal Code, vicarious liability can be fastened under Sections 34, 109, 120-B and 149 IPC. In relation to offences under Section 138 of the Negotiable Instruments Act 1881, primary liability is that of the person who has issued the cheque in question. Vicarious liability is attracted by virtue of Section 141 of the Negotiable Instruments Act 1881 which states that where the offence is committed by a company, (a company meaning a body

incorporated and including a partnership firm), persons who were in-charge and were responsible to the company (partnership firm) for the conduct of the business of the company (partnership firm) shall be deemed to be guilty of the offence under Section 138 of the Negotiable Instruments Act 1881.

16. Position of directors of a company is distinct from that of partners of a partnership firm.

17. A director may or may not be liable for the conduct of the business of a company unless under the articles of association of a company it has been provided to the contra or by a board of resolution a director is made responsible for the conduct of business of a company. But, in a partnership firm, the rule is to the contrary. Unless the partnership deed provides to the contrary, every partner has a right in law to conduct the business of the partnership firm. [See Section 12(a) of the Partnership Act]. Further, under Section 18 of the Partnership Act a partner is the agent of the firm for the purposes of the business of the firm. A director is not treated to be the agent of the company.

18. With this distinction in mind, decisions pertaining to liability of directors of a company have to be considered. The said decisions would not strictly be attracted when the dispute relates to a partnership firm. Though, I may hasten to add that generic

principles would certainly be attracted.

19. Having noted the specific averments in para 4 of the complaint against the petitioner I am satisfied that there was sufficient material before the learned Metropolitan Magistrate justifying the passing of the summoning order.

20. The petitions are dismissed.

21. No costs.

October 24, 2007 **PRADEEP NANDRAJOG, J.**
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